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Incurring the Jointly and Severally Liability and the Procedure of Insolvency. Compatibility or Exclusive Character

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ABSTRACT: The procedure for incurring the jointly and severally liability regulated by the provisions of art. 25 and 26 of the new Fiscal Procedure Code also applies if the debtor is in the insolvency procedure regulated by Law no. 85/2006 on insolvency prevention procedures and insolvency proceedings. The two distinct types of liabilities engaged in two different procedures do not overlap or exclude each other. Regarding the attraction of joint and several liability, according to Article 25 para. (3) of the Fiscal Procedure Code, the text of the law stipulates as a pre-existing condition the state of insolvability or insolvency of a legal person. Therefore, joint and several liability may be incurred, according to Article 25 para. (3) of the normative act specified above, if the (principal) debtor has been declared either in a state of insolvability or in a state of insolvency.

KEYWORDS: debtor, insolvability, insolvency, incurring joint and several liability, taxation decision

Introductory considerations

Recent judicial practice has revealed a legal issue which is able to lead to different interpretations and, consequently, to contrary solutions regarding the possibility of operating two different proceedings in respect to the same insolvent debtor, namely the incurrence of joint and several liability in fiscal matters at the same time with the start of the insolvency proceedings, being therefore essential to establish the relationship between Law no. 85/2014 on insolvency prevention procedures and insolvency proceedings and the new Fiscal Procedure Code. The divergence of jurisprudence was circumscribed to the factual and legal situation in which, after the issuance of the taxation decision, regarding the legal person taxpayer was ordered by a decision of incurrence and commitment of joint and several liability of the natural person administrator of the debtor, within the limit of a part of the fiscal debt. In the appeal against the decision to incurring the jointly and severally liability the legal person debtor was invoked the fact that, following the opening of the insolvency procedure, the proportion between the special and the general norm must be made, as well as the fact that the special norm is provided by the Law 85/2014, according to the Decision of the High Court of Cassation and Justice no. 28/2018.

Thus, in a first jurisprudential orientation, with majority (Decision no. 2780/03.09.2018 given by Craiova Court of Appeal, Administrative and Fiscal Contentious Section, sentence no. 786/2012 given by Craiova Court of Appeal, Administrative and Fiscal Contentious Section, Decision no. 2780/3.09.2018 given by Craiova Court of Appeal, Administrative and Fiscal Contentious Section, Decision no. 2432/26.06.2018 given by Craiova Court of Appeal, Administrative and Fiscal Contentious Section) it was argued that the situations regulated by Article 25 and Article 26 of Law no. 207/2015 regarding the Fiscal Procedure Code, do not overlap with the facts for which the liability of the members of the management bodies can be incurred according to Article 169 of Law no. 85/2014. There is no provision in Law no. 85/2014 or in the Fiscal Procedure Code, which should prevent the development of the procedure regulated by Article 25 and 26 of Law no. 207/2015 after the opening of the insolvency procedure. The minority opinion (Sentence no. 1211/28.09.2018 given by Gorj County Court - Administrative and Fiscal Contentious Section) considered that the bankruptcy procedure excludes the one of incurring the joint and several liability of the administrator and that for the recovery of fiscal receivables from the debtors who are in a state of insolvency according to Law

no. 85/2014, the tax authority had the obligation to request registration to the creditors' mass of taxes, fees, social contributions existing in the record of fiscal receivables at the date of declaring insolvency, as provided by para. 5 of Article 265 of the Fiscal Procedure Code.

Notions of insolvability and insolvency

Reported to the state of insolvability, according to Article 265 para. (1) of the Fiscal Procedure Code, it is considered as insolvent the debtor whose income or traceable assets have a lower value than the fiscal payment obligations or who has no traceable income or assets (Sasu, Tatu and Pietroi 2008, 205; Şaguna and Şova 2008, 83-84). The fiscal receivables for which the possibility of declaring the state of insolvability is analyzed are represented both by the main fiscal obligations and by the accessory fiscal obligations related to them. If the legal conditions are met, the debtor in question will be declared insolvent based on a verbal order prepared by the compartment with enforcement powers within the fiscal body, approved and endorsed according to the procedure regulated by the National Agency for Fiscal Administration order.

The procedure for declaring the state of insolvability applies both to debtors whose income or traceable assets have a lower value than the tax payment obligations, and also in the case of debtors who have no traceable income or assets In the first case, during the declaration of insolvability, the measures of foreclosure will not be interrupted and the main fiscal obligations carry accessories, until the date of their extinction (Florescu, Coman, Mrejeru, Safta and Bălaşa 2009, 130; Scarlat 2019, 633). Also, for the fiscal obligations of the debtors declared in a state of insolvability who do not have incomes or traceable assets, the head of the enforcement body orders the removal of the receivable from the current record and its entry into a separate record based on the insolvency (Article 265 paragraph 2 of the Fiscal Procedure Code), the elaboration of this verbal-order having a series of effects, such as: the interruption of the foreclosure; removing the receivable from the current record and passing it to a separate record; at least once a year the tax authorities have the obligation to carry out an investigation on the condition of these taxpayers; if it is found that the debtors have acquired traceable income or assets, the enforcement bodies will take the necessary measures to move them from separate records to current records and of foreclosure.

Reported to the state of insolvency, it is defined in Article 5 point 29 of Law no. 85/2014 thus: "insolvency is that state of the debtor's patrimony which is characterized by the insufficiency of funds available for the payment of certain, liquid and due debts, as follows: a) the debtor's insolvency is presumed when he, after 60 days from maturity, he has not paid his debt to the creditor; the presumption is relative; b) the insolvency is imminent when it is proved that the debtor will not be able to pay at maturity the due debts committed, with the funds available at the maturity date". In the case of debtors who are in the insolvency procedure, the fiscal body requests the registration in the creditors' mass of the taxes, fees, social contributions existing in the record of the fiscal receivables at the date of declaring the insolvency. From the date of opening the insolvency procedure, all foreclosure measures taken against the debtor's assets are suspended, and the capitalization of the creditors rights from the debtor's assets is made within the insolvency procedure, by submitting the application for admission of the claim to the creditors' mass (Article 75 par. 1 of Law no. 85/2014).

Therefore, from the analysis of the legal regulations, it results that the two notions are different, the insolvability being a more serious condition as it concerns the situation of the entire patrimony of the debtor, while the insolvency means only an insufficiency of the available funds. The fiscal body, finding that the debtor's income and assets have a lower value than the payment obligations through the verbal order of declaring the state of insolvability, resorted to the institution of attracting joint and several liability since the foreclosure subsequent to the issuance of the decision provided by Article 25 of the Fiscal Procedure Code, extends to the assets and income of a third party. After declaring the state of insolvability, a pre-existing condition for both

par. (2) as well as for par. (3) of Article 25 of the Fiscal Procedure Code, it is analyzed to what extent the incurring of joint and several liability can be taken, according to Article 25 para. (2) or para. (3), depending on the conditions imposed by these provisions.

The possibility of incurring joint and several liability at the same time as conducting the insolvency proceedings

The incidental normative framework in which the litigious relations take place is represented on the one hand by the provisions regarding the joint and several liability of the debtor, attracted pursuant to Article 25 para. 2 (b) and (d) of Law no. 207/2015 on the Fiscal Procedure Code, and on the other hand, by the facts provided by the provisions of Article 169 (a, d, e, h) of Law no. 85/2014 on insolvency. According to the provisions of Article 25 paragraph (2) of Fiscal Procedure Code, for the outstanding payment obligations of the debtor declared insolvent under the conditions of this code, the following persons are jointly and severally liable: “letter (b) administrators, associations, shareholders and any other persons who caused the insolvency of the legal entity debtor by alienation or concealment, in bad faith, in any form, of the debtor's assets; letter (d) the administrators or any other persons who, in bad faith, have determined the non-declaration and/or non-payment at maturity of the tax obligation”.

The provisions of Article 169 (a, d, e, h) of Law no. 85/2014 provide that “ (1) At the request of the judicial administrator or the judicial liquidator, the syndic judge may order that a part or the entire liability of the debtor, legal person, finding himself in insolvency, without exceeding the causal damage related to the respective act, to be borne by the members of the management and/or supervisory bodies of the company, as well as by any other persons who contributed to the insolvency of the debtor , by one of the following acts: a) they used the goods or credits of the legal person for their own benefit or for that of another person; d) kept a fictitious accounting, made some accounting documents disappear or did not keep the accounting in accordance with the law. In case of non-delivery of the accounting documents to the judicial administrator or the judicial liquidator, both the fault and the causal link between the act and the damage are presumed. The presumption is relative; e) misappropriated or concealed part of the legal person's assets or fictitiously increased its liabilities; h) any other act committed intentionally, which contributed to the debtor's state of insolvency, established according to the provisions of this title. (2) If the judicial administrator or, as the case may be, the judicial liquidator has not indicated the persons guilty of the debtor's state of insolvency and/or has decided that it is not the case to introduce the action provided in par. (1), it may be introduced by the president of the creditors 'committee following the decision of the creditors' meeting or, if the creditors 'committee has not been constituted, by a creditor appointed by the creditors' meeting”.

The creditor who holds more than 50% of the value of the receivables entered in the creditors’ mass may also introduce this action, under the same conditions. The judicial administrator or, as the case may be, the judicial liquidator, whenever he identifies the persons guilty of the state of insolvency of the debtor, shall promote the action in incurring the patrimonial responsibility. If the judicial administrator or, as the case may be, the judicial liquidator has not indicated the persons guilty of the debtor's state of insolvency, this may be introduced by the president of the creditors’ committee following the decision of the creditors’ meeting or, if the creditors' committee has not been constituted, by a creditor appointed by the creditors; meeting. The creditor who holds more than 30% of the value of the receivables entered in the creditors’ mass may also introduce this action, under the same conditions.

The Fiscal Procedure Code establishes the joint and several liability according to Article 25, as a way of recovering only the budget receivables, while Law no. 85/2014 (Law no. 85/2006) regulates the collective procedure for covering the liabilities of the insolvent debtor within which the state can also be a creditor for the receivables not paid to the consolidated budget together with other creditors. Through the measure of joint and several liability of the debtor, the tax authorities aim to recover the tax obligations from the assets of a third party and

not from the assets of the main debtor, affected to cover the receivables registered in the creditors' mass within the insolvency procedure. In case of joint and several liability, the action of the fiscal body, finalized by the decision issued based on the Article 25, and the action in court concern a third party and his assets. The complainant has the possibility, in his turn, by virtue of the right of recourse, to formulate within the insolvency proceedings, a statement of claim against the main debtor in joint and several liability with which he was obliged in the procedure regulated by the Fiscal Procedure Code. Precisely this means passive joint and several liability, in addition the creditor can pursue, at his choice on any of the joint and several co-debtors, for the entire debt.

In the interpretation and application of the incidental legal provisions, the judicial practice was oriented towards the recognition of the possibility of simultaneously carrying out the two procedures regarding the realization of the budgetary receivables. Thus, in its common jurisprudence the High Court of Cassation and Justice ruled that the fact that at the request of the tax authority, the court ordered the opening of insolvency proceedings against the debtor company is not a reason to make inapplicable the provisions of Article 27 Fiscal Procedure Code, since the provisions of Law no. 85/2006 do not exclude the procedure of attracting joint and several liability, specific to the recovery of budgetary receivables from the debtor declared insolvent, the state having at its disposal several procedures for the recovery of its receivables. For example, in decision no. 1070/2009 given by the High Court of Cassation and Justice - Administrative and Fiscal Contentious Section, it was noted that: "It is true that, following the non-increase of the share capital, the debtor was dissolved according to the provisions of art. 228 (b) of Law no. 31/1990 (R) but, according to Article 233, the dissolution of the company has the effect of opening the liquidation procedure, so that the dissolution does not prevent the recovery from the debtors of the receivables due to the state budget. Law no. 85/2006 aimed at establishing a collective procedure for covering the liabilities of the insolvent debtor, within which the state can also be a creditor for the unpaid receivables to the state budget. The Fiscal Procedure Code establishes the joint and several liability according to Article 27, as a way of recovering only the budget receivables. Law no. 31/1990 (R), Law no. 85/2006 and Fiscal Procedure Code, do not contain express provisions regarding the application with priority of some or others of the norms they enact, with incidence regarding the recovery of budgetary receivables. The fact that at the request of the General Directorate of Public Finances Bihor, the Bihor County Court ordered the opening of insolvency proceedings against the two companies does not represent a reason to make the provisions of Article 27 from the Fiscal Procedure Code to be inapplicable, since the provisions of Law no. 85/2006 do not exclude the procedure of attracting joint and several liability, specific to the recovery of budgetary receivables from the debtor declared insolvent, the state having at its disposal several procedures for the recovery of its receivables.".

Also the solutions given at the level of the courts of appeal are in the same sense, keeping in essence that Law no. 85/2006 regulates special equality rules but also hierarchy criteria for creditors of the same insolvent debtor, without suppressing their right to recover the receivable from other joint and several debtors (Decision no. 38/F-CC/2008 given by Pitesti Court of Appeal "The issuance of a debt title to a joint and several co-debtor is not suspended by the fact that the other co-debtor is in insolvency proceedings. Law no. 85/2006 establishes special rules of equality, but also of hierarchy for the creditors of an economic agent in insolvency, but not of denying their right to claim their receivable from other solidary debtors. The liability referred to in Article 27 and Article 28 of the Fiscal Procedure Code is a special liability which calls into question the perpetration of offences or quasi-offences").

However, the High Court of Cassation and Justice - Panel for resolving legal issues in civil matters - was notified of a preliminary ruling in order to resolve the relationship between the Fiscal Code and Law no. 85/2006, respectively the existence or not of a priority in implementation. Thus, the decision was pronounced in the interpretation of Article 147 (3) of law no. 571/2003, text that regulates the manner of determining the negative amount of the tax, cumulated and the option to

submit the negative statement, with the option of reimbursement. According to the reasoning part of Decision 28/2018 (Decision no. 28/2018 given by the High Court of Cassation and Justice published in the Official Gazette no. 506/20.06.2018) "the provisions of Article 1473 of Law no. 571/2003 on the Fiscal Code is interpreted in the sense that if it was found, by final decision, that a fiscal receivable cannot be capitalized in the insolvency procedure regulated by Law no. 85/2006, as a result of its late submission, the same receivable can no longer be capitalized by the fiscal body in the procedure of solving the request for reimbursement of the VAT, formulated by the debtor who is in the insolvency procedure". According to the considerations of Decision no. 28/2018, the Fiscal Code represents the general law in relation to Law no. 85/2014, noting that: "Both the insolvency law and the fiscal code contain special provisions, but each having its own field of regulation, but, given that in the collective, equalitarian and competitional procedure of insolvency participate all the creditors, including budgetary creditors, they must comply with the provisions of the insolvency law in the process of realizing the claim. In these circumstances, it can be appreciated that during this special insolvency procedure, the contrary provisions of another law can no longer be applied, regarding the realization of the claims, even if it regulates a procedure for establishing the fiscal receivables, as it is the Fiscal Code. The competition between the special law and the general law is resolved in favor of the first, according to the principle *specialia generalibus derogant.* The Fiscal Code regulates the general procedure for establishing fiscal receivables and for recovering fiscal receivables against debtors who are not in special situations, such as the insolvency procedure, and Law no. 85/2006 regulates the special procedure for the realization of all receivables, including fiscal receivables from an insolvent debtor. Therefore, in relation to the manner of realization of receivables against a debtor in insolvency proceedings, the provisions of the insolvency law apply with priority, the fiscal body being unable to capitalize its own claim, not registered at the passive table in the collective procedure, by rejecting the claim to refund the VAT in the procedure regulated by Article 147 of Law no. 571/2003 on the Fiscal Code. The factual situation analyzed in Decision no. 28/2018 concerns the circumstances in which the creditor of the receivable - fiscal body that holds a receivable born before the opening of the insolvency procedure, has not fulfilled its obligation to submit within the legal term imposed by 62 paragraph 1 (b) of Law no. 85/2006, of the application for enrollment in the creditors' mass, in this case the application being rejected as being formulated belatedly. In this hypothesis, the High Court of Cassation and Justice rules that it is not possible to recover the claim in other ways, even against members or associates with unlimited liability, presenting the nature of a sanction, related to non-fulfillment of obligations arising from insolvency proceedings. In the case submitted to the High Court of Cassation and Justice, the creditor - fiscal body tried to enforce the unconfirmed claim to the creditors' mass, by refusing to reimburse a VAT return, opposing compensation.

However, in the cases analyzed in the jurisprudence of the Administrative and Fiscal Contentious Section of Craiova Court of Appeal, the creditor - fiscal body, is legally registered in the creditors' mass within the insolvency procedure, did not proceed to a double enforcement of the claim against the same debtor on another way, did not choose an execution procedure after losing the right of access to a priority procedure by not complying with the legal conditions, but constitutes through the procedure regulated separately by Articles 25-28 from the Fiscal Procedure Code a new debt title related to a joint and several debtor, the administrator of the debtor company. On the other hand, one of the cases of incurring individual liability in the Fiscal Procedure Code is precisely the one in which, through fault, the administrator omits to request within the term and conditions of the law, the opening of insolvency proceedings so that, if the procedure is opened at the request of another creditor, this circumstance cannot be invoked as a cause of inapplicability *de plano* of incurring individual liability with tortious character. Or, even if the arguments of the supreme court referred to the relationship between the Fiscal Code and Law no. 85/2014, we consider that, by analogy, the interpretation is similar in the relationship with the Fiscal Procedure Code. However, this report does not lead to the conclusion that the two laws are mutually exclusive and that whenever Law no. 85/2014 is applied, the Fiscal Procedure

Code is no longer an incident. The competition between the special law and the general law is resolved in favor of the special law, according to the principle *specialia generalibus derogant*, as shown in the content of the decision cited above. The non-concurrent legal provisions will be applied separately, each in the field covered by the legal norm hypothesis. This means that the courts are required to verify, on a case-by-case basis, whether the actions of the administrator concerned by the tax authority for attracting joint and several liability fall exclusively under the tax law or are concurrent with the provisions of the special law, in the latter case it will give effect to the special law. In other words, the decision issued pursuant to Article 26 of the Fiscal Procedure Code cannot be cancelled on the grounds that the fiscal authority did not apply to the syndic judge, as he does not have the power to establish joint and several liability under the Fiscal Procedure Code, which is the sole responsibility of the fiscal authority. Law no. 85/2014 does not derogate from the tax law in this regard, which means that the provisions of the Fiscal Procedure Code will be applicable.

Therefore, the joint and several liability procedure regulated by the Fiscal Procedure Code is a distinct and specific procedure in relation to the procedure of liability of the members of the management bodies, regulated by Article 169 of Law no. 85/2014 (Article 138 of law no. 85/2006). The Fiscal Procedure Code establishes a special procedure for the recovery of fiscal receivables, if the conditions expressly provided by law are met, conditions that refer to the conduct of a natural person or legal persons who have been in legal relations with the tax debtor who, through their conduct, they made the tax obligations not to be paid. As expressly provided in the text of Article 25 para. (2) of the Fiscal Procedure Code, the liability of a natural or legal person is involved only if the debtor is declared insolvent. It should be emphasized that, in terms of attracting liability according to art. 25 para. (2) of the same normative act, the text of the law does not specify that the debtor is in a state of insolvency. As a result, the pre-existing condition for attracting liability is that the debtor to be insolvent, the insolvability being defined in Article 265 of the Fiscal Procedure Code. Regarding the incurring of joint and several liability, according to Article 25 para. (3) of the Fiscal Procedure Code, the text of the law stipulates as a pre-existing condition the state of insolvability or insolvency of a legal person. Therefore, joint and several liability may be incurred, according to Article 25 para. (3) if the (main) debtor has been declared either in a state of insolvability or in a state of insolvency.

Conclusions

Although the text of Article 265 of the Fiscal Procedure Code does not distinguish regarding the moment when a taxpayer declares himself insolvent, we consider that a legal entity in insolvency proceedings may be switched to insolvability if the conditions of the law are met (Article 176 of the Fiscal Procedure Code), with the observation that the competent fiscal body must participate in accordance with the law, together with the other creditors, in all operations related to liquidation and perform all diligences in order to recover the fiscal receivables due by the debtor to the state budget.

Thus, it results that, in case the conditions provided by the Fiscal Procedure Code for attracting the joint and several liability of the natural or legal person are met, the fiscal body is entitled to order the exercise of this liability even if the debtor is in insolvency. Consequently, from the comparative analysis of the liability regulated by the two normative acts, respectively Law no. 85/2014 and Law no. 207/2015, it can be observed that the situations and cases in which liability may be incurred are different and do not exclude each other. As a result, it cannot be brought into discussion the opportunity to attract liability according to Law no. 85/2014 or according to the Fiscal Procedure Code, the fiscal body being forced to use all the legal means at its disposal to recover the fiscal receivables.

In conclusion, we consider grounded and justified the interpretation according to which the procedure for incurring joint and several liability regulated by the provisions of Article 25 and

Article 26 of the new Fiscal Procedure Code also applies if the debtor is in the insolvency procedure regulated by Law no. 85/2006 on insolvency prevention procedures and insolvency proceedings.

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